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Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J–01–44 OF 2004
GOPAL SRI RAM, ZULKEFLI AND AZMEL JJCA
14 AUGUST 2006

C *Administrative Law — Judicial proceedings — Disciplinary proceedings — Plaintiff's past conduct was taken into account and not put to the plaintiff — Whether constitutes procedural unfairness*

D *Administrative Law — Rights and liabilities of public servants — Dismissal — Dismissal of police office — Plea of guilty — Whether plaintiff understood the nature and consequences of pleading guilty*

E *Public Servants — Disciplinary proceedings — Proceedings conducted under Police (Conduct and Discipline) (Junior Officers and Constables) Regulations 1970 — Allegation by police officer he was induced to plead guilty — Allegation not rebutted — Whether a case in which an adverse inference should have been drawn*

F The plaintiff, a lance corporal posted at the Pontian police station, Johor was dismissed for misconduct. He filed an action challenging his dismissal but failed before the High Court. The misconduct in question with which he was charged and for which he was dismissed was that he had failed to make entries in his pocket book for the period 4 May 1996 to 14 May 1996. The plaintiff received notice of hearing
G of a disciplinary inquiry into a charge against him for failure to maintain his pocket book. He attended the disciplinary hearing. He alleged that as he was about to enter the orderly room, the officer in charge of the police station ('the OCS') spoke to him. He induced the plaintiff to plead guilty to the charge. He said that if the plaintiff pleaded guilty he would receive a light sentence. The first defendant conducted the
H disciplinary inquiry. The charge was put to the plaintiff and the plaintiff pleaded guilty. Later the first defendant wrote a letter to the plaintiff informing him that he had been dismissed from service. It is not in dispute that in coming to his decision the first defendant took into account the plaintiff's past conduct. It is also not in dispute that the plaintiff's past conduct was never put to him at the inquiry. At the commencement of the trial, counsel on both sides informed the judicial
I commissioner that each would call one witness in support of their respective cases. The plaintiff gave evidence on oath. He was cross examined. Among other things, it was put to him that the OCS had never offered any inducement. The plaintiff denied this suggestion. At the close of the plaintiff's case, the defendants informed the court that they would not be calling any evidence but would make a submission.

Held, allowing the appeal:

(1) (per **Gopal Sri Ram JCA**) The allegation made by the plaintiff against the OCS must be presumed to be true. The burden then plainly lay on the defendants to call the OCS to rebut the plaintiff's evidence. That was not done. And no explanation was given by the defendants for this failure. This is therefore a case in which an adverse inference should have been drawn against the defendants by the learned judicial commissioner. Although s 114(g) of the Evidence Act 1950 confers a discretion on a trier of fact to draw such an inference. But the discretion is one which is required to be exercised judicially. So, where a party to an action provides no reasons as to why material witnesses were not called to give evidence, the court will normally draw an adverse inference (see paras 6–7); *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33 followed.

(2) (per **Gopal Sri Ram JCA**) The failure of the learned judicial commissioner to draw an adverse inference against the defendants is a serious misdirection which has occasioned a miscarriage of justice. The plaintiff was entitled to a finding from the High Court that he had established a prima facie case that he had been induced to plead guilty to the charge. That prima facie case which must be presumed to be true in the absence of any explanation from the defendants was strengthened and became — to borrow the words of Lord Lowry in *R v IRC; ex parte TC Coombs & Co* [1991] 2 AC 283 — 'a strong or even an overwhelming case' as a result of the defendants' silence (see para 11).

(3) (per **Gopal Sri Ram JCA**) The plaintiff's past conduct was taken into account by the defendants without putting it to the plaintiff in the first place. This constitutes procedural unfairness and renders the dismissal bad (see para 12); *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 followed.

(4) (per **Zulkefli JCA**) At no time did the plaintiff agree or admit that he understood the nature and consequences of his plea of guilt. From the records of proceedings recorded by the first defendant, nothing is stated that the first defendant had explained and the plaintiff understood the nature and consequences of pleading guilty. In cross-examination at the trial before the learned judicial commissioners the plaintiff was found to have only agreed that he understood the nature and consequences of the charge and not the nature and consequences of him pleading guilty (see paras 24–25).

(5) (per **Zulkefli JCA**) The failure to call the first defendant to testify that the past records of service of the plaintiff did not influence him would surely go to show that it did in fact or could have influenced his mind in respect of the punishment meted out. This is a full trial and the principle of law is that if the allegation made by the plaintiff against the defendants on essential issue remains unrebutted, then the allegation made by the plaintiff must be presumed to be true. In the present case, the failure to call the first defendant to rebut the plaintiff's evidence would result in an adverse inference be invoked against the defendants' case. Therefore, the learned judicial commissioner in the circumstances of this case had misdirected himself to have come to that finding without such evidence from the first defendant (see para 32).

[Bahasa Malaysia summary

Plaintif merupakan seorang lans koperal di balai polis di Pontian, Johor yang telah dipecat kerana salah laku. Beliau memfailkan satu tindakan mencabar pemecatannya tetapi gagal di mahkamah tinggi. Salah laku tersebut di mana ia dituduhkan dan yang mana ia dipecat adalah berhubungan dengan kegagalan membuat catatan/menulis buku saku mulai 4 Mei 1996 hingga 14 Mei 1996. Plaintif menerima notis pendengaran siasatan tatatertib terhadap tuduhan terhadapnya untuk kegagalan membuat catatan/menulis buku saku. Beliau telah menghadiri prosiding tatatertib tersebut. Beliau menyatakan bahawa sebelum beliau memasuki bilik siasatan tertutup itu (orderly room), pegawai yang bertanggungjawab di balai polis tersebut ('OCS tersebut') bercakap dengannya. Beliau mendorong plaintif mengaku bersalah terhadap tuduhan itu. Beliau juga menyatakan sekiranya plaintif mengaku bersalah beliau akan menerima hukuman ringan. Defendan pertama menjalankan siasatan tatatertib tersebut. Tuduhan diletakkan kepada plaintif dan plaintif mengaku bersalah. Selepas itu defendan pertama menulis surat kepada plaintif memberitahunya bahawa beliau telah dipecat daripada perkhidmatan. Ia tidak dipertikaikan bahawa dalam membuat keputusan tersebut defendan pertama mengambil kira kelakuan plaintif yang lepas. Ia juga tidak dipertikaikan bahawa kelakuan plaintif yang lepas tidak pernah dibangkitkan kepada plaintif di siasatan tersebut. Pada permulaan perbicaraan kedua-dua pihak peguam perbicaraan memberitahu pesuruhjaya kehakiman bahawa setiap dari mereka akan memanggil seorang saksi masing-masing untuk menyokong kes-kes mereka. Plaintif memberikan keterangan di bawah sumpah. Beliau diperiksa balas. Antara yang lain, ia diletakkan kepadanya bahawa OCS tidak pernah menawarkan sebarang dorongan. Plaintif menafikan cadangan ini. Pada penutup kes plaintif, defendan memberitahu mahkamah bahawa mereka tidak akan memanggil sebarang keterangan tetapi akan membuat hujahan.

Diputuskan, membenarkan rayuan tersebut:

(1) (oleh **Gopal Sri Ram HMR**) Dakwaan plaintif terhadap OCS tersebut mesti dianggap sebagai benar. Beban adalah dengan jelas di atas defendan-defendan untuk memanggil OCS tersebut untuk mematahkan keterangan plaintif. Itu tidak dilakukan. Dan tiada penjelasan yang diberikan oleh defendan-defendan terhadap kegagalan ini. Dengan ini, ia merupakan satu kes di mana inferens menentang patut ditimbulkan terhadap defendan-defendan oleh pesuruhjaya kehakiman yang bijaksana tersebut. Walaupun seksyen 114(g) Akta Keterangan 1950 memberikan budi bicara kepada pembicara fakta membentuk inferens sebegini. Akan tetapi budi bicara tersebut adalah satu yang mana ia perlu digunakan dengan adil. Jadi, apabila satu pihak kepada tindakan tidak memberikan sebarang alasan kenapa saksi-saksi material tidak dipanggil untuk memberikan keterangan, mahkamah akan membentuk satu inferens menentang (lihat perenggan 6–7); *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33 diikut.

(2) (oleh **Gopal Sri Ram HMR**) Kegagalan pesuruhjaya kehakiman membentuk satu inferens menentang terhadap defendan-defendan adalah satu salah arah

yang serius yang mengakibatkan satu perlaksanaan keadilan yang salah. Plaintif berhak mendapatkan satu keputusan daripada mahkamah tinggi bahawa beliau telah mewujudkan satu kes prima facie bahawa beliau telah didorong mengaku bersalah terhadap tuduhan tersebut. Kes prima facie tersebut mesti dianggap sebagai benar tanpa sebarang penjelasan daripada defendan-defendan dan diperkukuhkan dan dijadikan — secara meminjam kata-kata Lord Lowry di dalam kes *R v IRC ex parte; TC Coombs & Co* [1991] 2 AC 283 — 'a strong or even an overwhelming case' yang disebabkan oleh kesenyapan defendan-defendan (lihat perenggan 11).

(3) (oleh **Gopal Sri Ram HMR**) Kelakuan plaintif yang lepas telah diambil kira oleh defendan-defendan tanpa meletakkannya kepada plaintif terlebih dahulu. Ini menjadikannya satu ketidakadilan prosedur dan menyebabkan pemecatannya salah (lihat perenggan 12); *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 diikut.

(4) (oleh **Zulkefli HMR**) Tiada masa bila-bila pun plaintif bersetuju atau mengaku bahawa beliau faham akan sifat dan akibat pengakuan salahnya. Daripada rekod-rekod prosiding yang direkodkan oleh defendan pertama, tiada apa-apa yang menyatakan bahawa defendan pertama telah menjelaskan dan bahawa plaintif faham akan sifat dan akibat pengakuan salah. Dalam soal-balas diperbicaraan sebelum pesuruhjaya kehakiman, plaintif telah didapati hanya bersetuju bahawa beliau faham akan sifat dan akibat tuduhan tersebut tetapi bukan akan sifat dan akibat pengakuan salahnya (lihat perenggan 24–25).

(5) (oleh **Zulkefli HMR**) Kegagalan memanggil defendan pertama memberi keterangan bahawa rekod-rekod perkhidmatan plaintif yang lampau tidak mempengaruhinya tentunya menunjukkan bahawa ia sebenarnya atau dapat mempengaruhinya berhubungan dengan hukuman yang dikenakan. Ini merupakan perbicaraan penuh dan prinsip undang-undang ialah sekiranya sesuatu alegasi oleh plaintif terhadap defendan-defendan atas isu yang penting tidak dipatahkan, dengan itu alegasi yang dibuat oleh plaintif mesti dianggap sebagai benar. Dalam kes ini, kegagalan memanggil defendan pertama untuk mematahkan keterangan plaintif akan menyebabkan inferens menentang digunakan terhadap kes defendan-defendan. Dengan itu, pesuruhjaya kehakiman yang bijaksana dalam keadaan kes ini telah salah arahkan dirinya dalam keputusannya tanpa sebarang bukti daripada defendan pertama (lihat perenggan 32).]

Notes

For a case on disciplinary proceedings, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 154.

For a case on proceedings conducted under Police (Conduct and Discipline) (Junior Officers and Constables) Regulations 1970, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1795.

For cases on dismissal of public servants, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 732–766.

Cases referred to

Alexander v Rayson [1936] 1 KB 169 (refd)
Benham Limited v Kythira Investments Ltd [2003] EWCA Civ 1794 (refd)
Boyce v Wyatt Engineering [2001] EWCA Civ 692 (refd)
Crawford v Financial Institutions Services Ltd (Jamaica) [2005] UKPC 40 (refd)
Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33 (folld)
Herrington v British Railways Board [1972] AC 877 (refd)
Laurie v Raglan Building Co Ltd [1942] 1 KB 152 (refd)
Miller (t/a Waterloo Plant) v Cawley [2002] EWCA Civ 1100 (refd)
Parry v Aluminium Corporation (1940) 162 LT 236 (refd)
R v IRC ex parte T C Coombs & Co [1991] 2 AC 283 (refd)
Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor [1990] 3 MLJ 364 (refd)
Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor [1990] 3 MLJ 364 (folld)
Storey v Storey [1961] P 63 (refd)
Synn Lee & Co Ltd v Bank of China [1962] MLJ 395 (refd)
Virendra Kumar Saklecha v Jagjiwan and Others AIR 1974 Supreme Court 1957 (refd)
Wasakah Singh v Bachan Singh (1931) 1 MC 125 (refd)
Wilson v Wilson [1958] 3 All ER 195 (refd)
Wisniewski v Central Manchester Health Authority [1998] PIQR 324 (refd)
Yuill v Yuill [1945] P 15 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 reg 6(10)

Appeal from: Civil Suit No 21–105 of 1999 (High Court, Johor Bahru)

G Subramaniam Nair (K Munjeet Singh with him) (Maniam Nair & Co) for the plaintiff.
Narkunavathy Sundareson (Attorney General's Chambers) for the defendant.

Gopal Sri Ram JCA:

[1] The plaintiff was a Lance Corporal in the Royal Malaysian Police. He was dismissed for misconduct. He filed an action challenging his dismissal. He failed before the High Court. He appealed to us. We heard the appeal on 21 June 2006 and reserved judgment. Our conclusions and the reasons for them now follow.

[2] At the material time, the plaintiff was posted at the Police Station in Pontian, Johor. The misconduct in question with which he was charged and for which he was dismissed was that he had failed to make entries in his Pocket Book for the period 4 May 1996 to 14 May 1996. His case is this. He was on leave from 4 May 1996 to 17 May 1996. The leave had been sanctioned by Officer in Charge of the Police

District of Pontian ('the OCPD'). He obtained leave to go to his home town, Alor Setar in Kedah. On 10 May 1996, he received a message from the OCPD requiring him to return to duty at once. The plaintiff returned to Pontian and reported for duty at the police station on 14 May 1996. Almost as soon as he came on duty, Sergeant Major Mustaffa Taib, the Officer in Charge of the Police Station ('the OCS') sent for the plaintiff. He asked the plaintiff to produce his Pocket Book for the purpose of being signed off by him, that is to say, the OCS. The plaintiff informed the OCS that as he had returned from leave because of his urgent recall, he had not had sufficient time to update the entries in his Pocket Book. The OCS was not prepared to listen to any explanation. He straightaway made an entry in the Station Diary against the plaintiff for not having a Pocket Book with up to date entries. He also seized the Pocket Book. Later, the plaintiff received notice of hearing of a disciplinary inquiry into a charge against him for failure to maintain his Pocket Book. He attended the disciplinary hearing. As he was about to enter the Orderly Room, the OCS spoke to him. He induced the plaintiff to plead guilty to the charge. He said that if the plaintiff pleaded guilty he would receive a light sentence. The first defendant conducted the disciplinary inquiry. The charge was put to the plaintiff. Because of the inducement offered him by the OCS, the plaintiff pleaded guilty. Later the first defendant wrote a letter to the plaintiff informing him that he had been dismissed from service. It is not in dispute that in coming to his decision the first defendant took into account the plaintiff's past conduct. It is also not in dispute that the plaintiff's past conduct was never put to him at the inquiry.

[3] At the commencement of the trial, counsel on both sides informed the judicial commissioner that each will call one witness in support of their respective cases. For his part, the plaintiff gave evidence on oath. He was cross examined. Among other things, it was put to him that the OCS had never offered any inducement. The plaintiff denied this suggestion. At the close of the plaintiff's case, the defendants informed the court that they would not be calling any evidence but would make a submission. Thereafter, both sides made their respective submissions and the learned judicial commissioner in a reserved judgment dismissed the plaintiff's claim. Now, there is nothing in the notes recorded by the learned judicial commissioner that he put the defendants to their election. More importantly, it appears that the learned judicial commissioner did not ask federal counsel before him why, after having led the court into believing that evidence would be called a sudden change in stance had taken place. It cannot be over emphasised that counsel, whether from the Bar or the Chambers of the Attorney General must not mislead a court or the opponent. To lead the court and your opponent into believing that evidence will be called and then suddenly and without any explanation changing stance is not acceptable conduct by an advocate. This is one unsatisfactory feature of the trial. The other unsatisfactory feature is the failure of the learned judicial commissioner to follow the correct procedure when a party elects not to call evidence. It has been repeatedly held that where a defendant elects not to call evidence in a civil case tried by a judge sitting alone, the judge must put that defendant to his election to stand or fall on his or her submission (see *Parry v Aluminium Corporation* (1940) 162 LT 236; *Laurie v Raglan Building Co Ltd* [1942] 1 KB 152 at p 156; *Yuill v Yuill* [1945] P 15; *Wilson v Wilson* [1958] 3 All ER 195; *Storey v Storey* [1961] P 63. That was not done here.

[4] The correct approach that a trial court should take when a defendant says that he or she will not be calling evidence is set out in a number of cases of which *Alexander v Rayson* [1936] 1 KB 169 is the leading authority. One of the more recent cases in point is *Boyce v Wyatt Engineering* [2001] EWCA Civ 692 which was followed in *Miller (t/a Waterloo Plant) v Cawley* [2002] EWCA Civ 1100 and *Benham Limited v Kythira Investments Ltd* [2003] EWCA Civ 1794. The test to be applied in a case where a submission of no case is made was set out as follows in *Miller (t/a Waterloo Plant) v Cawley*:

> Where a defendant was put to his or her election and elected to call no evidence, the issue was not whether there was any real or reasonable prospect that the claimant's case might be made out or any case fit to go before a jury or judge of fact. Rather, it was the straightforward issue, arising in any trial after all the evidence had been called, namely whether or not the claimant had established his or her case by the evidence called on the balance of probabilities.

[5] Closer to home, in *Wasakah Singh v Bachan Singh* (1931) 1 MC 125 at p 128, Elphinstone CJ said:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. *For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.* (Emphasis added.)

[6] Now apply that here. The allegation made by the plaintiff against the OCS must be presumed to be true. The burden then plainly lay on the defendants to call the OCS to rebut the plaintiff's evidence. That was not done. And no explanation was given by the defendants for this failure. This is therefore a case in which an adverse inference should have been drawn against the defendants by the learned judicial commissioner.

[7] I am conscious that s 114(g) of the Evidence Act 1950 confers a discretion on a trier of fact to draw such an inference. See *Synn Lee & Co Ltd v Bank of China* [1962] MLJ 395. But the discretion is one which is required to be exercised judicially. So, where a party to an action provides no reasons as to why material witnesses were not called to give evidence, the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33.

[8] In *Wisniewski v Central Manchester Health Authority* [1998] P.I.Q.R. 324, Brooke LJ when delivering the judgment of the Court of Appeal quoted from a number of authorities including the following passage from the speech of Lord Diplock in *Herrington v British Railways Board* [1972] AC 877:

> The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our

adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

[9] Brooke LJ then went on to say as follows:

From this line of authority I derive the following principles in the context of the present case:

(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

[10] More recently, in *Crawford v Financial Institutions Services Ltd (Jamaica)* [2005] UKPC 40, Lord Walker of Gestingthorpe when delivering the Advice of the Privy Council said this:

It is well settled that in civil proceedings the court may draw adverse inferences from a defendant's decision not to give or call evidence as to matters within the knowledge of himself or his employees.

[11] Based on the authorities cited, I am of the respectful view that the failure of the learned judicial commissioner to draw an adverse inference against the defendants is a serious misdirection which has occasioned a miscarriage of justice. In my judgment, the plaintiff was entitled to a finding from the High Court that he had established a prima facie case that he had been induced to plead guilty to the charge. That prima facie case which must be presumed to be true in the absence of any explanation from the defendants was strengthened and became —to borrow the words of Lord Lowry in *R. v IRC ex parte; TC Coombs & Co* [1991] 2 A.C. 283 — 'a strong or even an overwhelming case' as a result of the defendants' silence.

[12] There is another reason why the plaintiff's dismissal is void. It is this. As I have already said, his past conduct was taken into account by the defendants without putting it to the plaintiff in the first place. This constitutes procedural unfairness and renders the dismissal bad. On this point, I need do no more than to refer to the decision of the Supreme Court in *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364. There too the appellant Shamsiah's record of service was taken into account when imposing punishment on her. But that

record was never shown to her. Her action challenging her dismissal failed before the High Court. On appeal, the Supreme Court reversed. In that context, Jemuri Serjan SCJ said:

> We wish to add that it has been held that tribunals must not continue privately to obtain evidence or other information between the conclusion of the hearing and the making of the decision, without notifying the parties so as to give them an opportunity to make submissions on it. See for example *R v Deputy Industrial Injuries Commissioner, ex p Jones* [1962] 2 QB 677 and *Fairmont Investments Ltd v Secretary of State for the Environment* [1967] 1 WLR 1255. It was manifestly demonstrated to us that the first respondent had infringed the rule of natural justice in not affording the appellant the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under the 1969 Regulations.

[13] For the reasons already given, I would allow the appeal and set aside the orders made by the High Court. The plaintiff shall have a decree of declaration that his dismissal is void. I also direct an inquiry into the emoluments and other benefits the plaintiff is entitled to receive from the defendants. Such inquiry shall be conducted by the senior assistant registrar of the High Court to whom I would remit the matter. The defendants shall bear the costs of this appeal and those incurred in the court below. The deposit in court shall be refunded to the plaintiff.

[14] My learned brother, Azmel JCA has seen this judgment in draft and has expressed his agreement with it.

Zulkefli JCA:

[15] I have read the judgment in draft of my learned brother Gopal Sri Ram JCA. I agree with the views expressed and the orders made by his Lordship in allowing this appeal by the plaintiff. I would like to herein deal with some of the issues raised in this appeal in support of the judgment of my learned brother Gopal Sri Ram JCA as follows:

[16] The plaintiff, a Lance Corporal in the Royal Malaysian Police Force ('Police Force') until his dismissal was called to attend disciplinary room proceedings on 8 November 1996 to answer a charge under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('Police Regulations 1970'). The charge reads as follow:

> … Bahawa anda seorang L/Kpl dalam Pasukan Polis Di Raja Malaysia semasa itu bertugas di Balai Polis Pontian, dalam Kontinjen Johor. Pada 14–5–1996 jam lebih kurang 8.30 pagi anda telah didapati tidak membuat catatan/menulis Buku Saku anda mulai 4 Mei 1996 hingga 14 Mei 1996. Dengan demikian anda telah didapati tidak menurut perintah yang sah iaitu arahan PTKPN Bab A 121 para 1. Oleh yang demikian anda telah melakukan kesalahan tatatertib di bawah Jadual (Peraturan 2) (7) Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai-Pegawai Rendah Polis dan Mata-Mata) 1970 Pindaan 1984 dan boleh dihukum di bawah peraturan yang sama ….

[17] In the said proceedings, the plaintiff pleaded guilty and he was accordingly dismissed from the Police Force by the first defendant for the above charge on 8 November 1996.

BREACH OF REGULATION 6(10) OF THE POLICE REGULATIONS 1970

[18] The plaintiff alleged that the learned judicial commissioner failed to fully consider the defendants' non-compliance of the provision of reg 6(10) of the Police Regulations 1970. The plaintiff also alleged that the learned judicial commissioner failed to take into account that the plaintiff's guilty plea was qualified as he had been induced into pleading guilty by Sergeant Major Mostafa bin Taib. Lastly, the plaintiff took issue with the fact that Sergeant Major Mostafa bin Taib was not called upon to deny this inducement.

[19] Regulation 6(10) of the Police Regulations 1970 provides as follows:

> The adjudicating authority shall at all times satisfy itself that the officer understands the nature and the effect of the proceedings and has a proper opportunity to defend himself.

[20] It is my view that the first question to be addressed in respect of the above provision of the law is whether the plaintiff's plea was an unequivocal plea of guilt or was it as a result of the inducement by Sergeant Major Mostafa. In my judgment having regard to the evidence on record, it is a fair inference that the guilty plea was made due to the Sergeant Major Mostafa's inducement. On the evidence adduced at the trial, it is noted according to the plaintiff, before he entered the orderly room proceedings on the 8 November 1996, Sergeant Major Mostafa came around and induced him to plead guilty as he was made to understand that the sentence would be lighter. On this point in examination-in-chief, the plaintiff, inter alia, had this to say:

> … Saya tidak tahu tindakan diambil dengan tujuan buang kerja ….
>
> … Ya, Sjn. Mejar Mustaffa dorong saya mengaku salah. Dia jumpa saya di luar bilik Acara Tatatertib di Balai Polis Pontian pada pagi pendengaran acara tatatertib …

(See p 67 of the appeal record)

[21] In cross-examination, the plaintiff was also found to have stated as follows:

> … Tidak setuju Sjn. Mejar Mustaffa tidak mempengaruhi saya membuat pengakuan bersalah …
>
> … Sjn. Mejar Mustaffa ada mempengaruhi saya dan buat dorongan ….

(See p 71 of the appeal record)

[22] Despite the fact that it was pleaded and the evidence was adduced in court by the plaintiff as shown above, no rebuttal evidence was adduced by the defendants. In fact, it is most surprising that Sergeant Major Mostafa was not even called at all by the defendants to testify and deny this fact or allegation. Since Sergeant Major

Mostafa was not called to deny nor rebut the allegation of inducement, the allegation made by the plaintiff against Sergeant Major Mostafa must be presumed to be true. No explanation was given by the defendants for this failure. I am in full agreement with the views expressed by my learned brother Gopal Sri Ram JCA in his judgment when his lordship stated that this is therefore a case in which an adverse inference under s 114(g) of the Evidence Act 1950 should have been drawn against the defendants by the judicial commissioner. On this point, I would also like to refer to the case of *Virendra Kumar Saklecha v Jagjiwan & Ors* AIR 1974 Supreme Court 1957 wherein on appeal in an election petition's case the Supreme Court of India held that the non production of a material witness would result in an adverse inference to be drawn against the petitioner's case. In that case, the petitioner gave an undertaking to the court to produce witnesses for cross-examination. The witnesses however were not produced and the Court held that the petitioner's case was not true (see also other cases having the same effect that may be found in *Sarkar on Evidence* 15th Ed, Reprint 2004 (Vol 2) at pp 1688–1689).

[23] The second question to be addressed is whether the plaintiff understood the nature and consequences of pleading guilty. The learned judicial commissioner in his judgment went to the facts and said that the plaintiff admitted that he did not make entries in his Pocket Book. With this, the learned judicial commissioner came to the conclusion that the plaintiff knew the nature and consequences of his plea by stating the following:

> … It is noteworthy that the plaintiff in his evidence in court acknowledged and confirmed the fact that he did not make entries in his diary between the period 4 May 1996 to 14 May 1996 which is the subject matter of the charge against him. He knew the nature and consequences of his plea of guilt. Hence he was appraised of the subject matter of the charge and cannot now say that he was induced by SM Mostafa. The decision to plead guilty to the charge preferred was to my mind a decision made voluntarily by the plaintiff and without any inducement by any party ….

(See p 22 of the appeal record)

[24] With respect to the above finding of the learned judicial commissioner, I find that at no time did the plaintiff agree or admit that he understood the nature and consequences of his plea of guilt. In his evidence-in-chief before the trial court on this point the plaintiff had inter alia stated the following relevant facts which may be reproduced as follows:

(i) … Dia tidak memberitahu hak-hak saya ….

(ii) … Pengadil tidak menerangkan akibat pengakuan ….

(iii) … Pengadil terus menerima keterangan-keterangan selepas pembacaan pertuduhan dan pengakuan salah ….

(See p 67 of the appeal record)

[25] It is also to be noted from the records of proceedings recorded by the first defendant, nothing is stated that the first defendant had explained and the plaintiff understood the nature and consequences of pleading guilty (see p 166 of the appeal record (No 2)). In cross-examination at the trial before the learned judicial

commissioners, the plaintiff was found to have only agreed that he understood the nature and consequences of the charge and not the nature and consequences of him pleading guilty.

[26] I am also of the view that the learned senior federal counsel for the defendants is wrong in her submission that just because the plaintiff knew that the presiding officer was a Deputy Chief of Police, the consequences of pleading guilty included dismissal from the Police Force. This argument is untenable. There is no case authority cited to support such a proposition. In the circumstances of this case, it is my finding that the plea made by the plaintiff is a qualified plea and the first defendant as the adjudicating officer has breached reg 6(10) of Police Regulations 1970 in his conduct of the said disciplinary proceedings.

WHETHER THE PLAINTIFF WAS DEPRIVED OF A REASONABLE AND PROPER OPPORTUNITY TO EXPLAIN HIS PREVIOUS RECORD OF SERVICE

[27] I shall now deal with the issue of whether the plaintiff was deprived of a reasonable and proper opportunity to explain his previous record of service. Learned counsel for the plaintiff contended that the learned judicial commissioner had erred when his lordship found that although the Orderly Room procedure notes show a notation of the plaintiff's previous conviction record, the first defendant was not influenced by the same. For the plaintiff, it was argued that the learned judicial commissioner failed to consider that the plaintiff was not given a chance to explain or mitigate his previous record before he was punished. This the plaintiff contended is contrary to the principle enunciated in the Federal Court case of *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor.* [1990] 3 MLJ 364 wherein the first defendant is said to have infringed the rule of natural justice in not affording the plaintiff the opportunity to explain or controvert his record of service which played a part in influencing the decision of the first defendant to impose the severest punishment permissible under the Police Regulations 1970.

[28] The question that arises here is whether the first defendant as the adjudicating authority had in fact taken into account the previous record of the plaintiff before imposing a severe punishment of dismissal. From the record of the disciplinary proceedings conducted by the first defendant, it is noted that after the first defendant found the plaintiff guilty, he had asked for the plaintiff's mitigation. However, before passing sentence the first defendant perused the record of service of the plaintiff which was given to him. He then went on to record all the previous records of the plaintiff in the notes of proceedings (see pp 165–169 of the appeal record (No 2)). In my view, these records were within the first defendant's knowledge at that very moment of time. Immediately after recording in the notes of proceedings, the first defendant passed the severest punishment of dismissal on the plaintiff with immediate effect without the consideration of the following relevant requirements:

(i) the necessity of giving notice to the plaintiff of his previous records of service;

(ii) the necessity of reading the previous records of service to the plaintiff; and

(iii) the necessity of asking the plaintiff whether he has anything to say in respect of his records of service.

[29] The plaintiff in his evidence-in-chief had confirmed that he did not receive any notice of his previous records of service from the first defendant. In cross-examination the plaintiff had in fact categorically stated as follows:

> … Kesalahan-kesalahan lepas yang dicatit di dalam Penyata Diri — tidak dibaca kepada saya — tidak lihat catitan tersebut …
>
> … Pengadil tidak bertanya saya kesalahan-kesalahan yang lampau …
>
> … Saya tidak mengesahkan catitan-catitan yang dibuat berkenaan kesalahan lampau semasa prosiding tatatertib …

(See p 70 of the appeal record)

[30] The learned judicial commissioner however on this point had this to say:

> … From the notes of the disciplinary proceeding it cannot be disputed that the previous record of disciplinary proceeding against the plaintiff is before the first defendant. However, there is no notation that the punishment meted out was influenced and/or based by his prior disciplinary record …

(See p 23 of the appeal record)

[31] With respect to the above finding of the learned judicial commissioner the proper questions to be posed should be as follows:

1. What was the purpose of giving the first defendant the records of service of the plaintiff?
2. Why did the first defendant go through and make the plaintiff's records of service as part of the records of proceedings before passing severe sentence?

[32] It is my considered view that the failure to call the first defendant to testify that the past records of service of the plaintiff did not influence him would surely go to show that it did in fact or could have influenced his mind in respect of the punishment meted out. This is a full trial and as earlier stated, the principle of law is that if the allegation made by the plaintiff against the defendants on essential issue remains unrebutted, then the allegation made by the plaintiff must be presumed to be true. In the present case, the failure to call the first defendant to rebut the plaintiff's evidence would result in an adverse inference be invoked against the defendants' case. Therefore, the learned judicial commissioner in the circumstances of this case has misdirected himself to have come to that finding without such evidence from the first defendant (see para 32).

Appeal allowed.

Reported by Sally Kee